Badan Pengurusan Bersama Kompleks Pandan Safari Lagoon v CHN Commodity Trade Centre Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WINDING UP PETITION NO 28NCC-812–09 OF 2015
HASNAH HASHIM J
2 FEBRUARY 2016

Companies and Corporations — Winding up — Petition — Respondent indebted to petitioner — Respondent failed to pay judgment sum to petitioner — Whether respondent solvent — Companies Act 1965 s 218(1)(e)

The petitioner claimed that the respondent was indebted to it for the amount of RM1,269,347.03 being the amount due and outstanding for service charges, quit rent and insurance premiums for the properties owned by the respondent in Pandan Safari Lagoon Complex. Due to the failure of the respondent to pay the judgment sum, the petitioner filed this petition pursuant to s 218(1)(e) of the Companies Act 1965 and sought an order that the respondent be wound up by the court. In response, one Gerald Yeo @ Yeo Ah Kee, a director of the respondent filed an affidavit in reply, inter alia, stating that two contributories holding 80% of the shares in the respondent had filed a notice of intention to appear to oppose the petition.

Held, allowing the petition:

(1) The respondent failed to pay the judgment sum to the petitioner triggered the presumption that the respondent was unable to pay its debts. In addition, the respondent did not file any affidavit in opposition to challenge the petition. The affidavit in reply filed by the director of the respondent did not show any evidence that the respondent was solvent. There was no other evidence shown as proof of the solvency of the respondent. Thus, the statutory demand issues remained unsatisfied. The presumption of inability to pay its debts expressly provided under that provision applied against the respondent and was not in any way displaced (see paras 17–19).

[Bahasa Malaysia summary

Pempetisyen mendakwa bahawa responden berhutang kepadanya bagi jumlah sebanyak RM1,269,347.03 sebagai jumlah yang kena dibayar bagi caj-caj perkhidmatan, cukai tanah dan premium insurans bagi hartanah-hartanah yang dimiliki oleh responden di Kompleks Pandan Safari Lagoon. Akibat kegagalan responden untuk membayar jumlah penghakiman, pempetisyen

memfailkan petisyen ini berikutan s 218(1)(e) Akta Syarikat 1965 dan memohon perintah bahawa responden digulung oleh mahkamah. Dalam jawapan, seorang yang bernama Gerald Yeo @ Yeo Ah Kee, pengarah responden memfailkan afidavit jawapan, antara lain, menyatakan bahawa kedua-dua penyumbang memegang 80% saham di dalam responden telah memfailkan notis niat untuk menghadiri untuk menentang petisyen tersebut.

Diputuskan, menolak petisyen:

(1) Responden gagal untuk membayar jumlah penghakiman kepada pempetisyen mencetuskan anggapan bahawa responden tidak dapat membayar hutangnya. Tambahan, responden tidak memfailkan apa-apa afidavit menentang untuk mencabar petisyen tersebut. Afidavit jawapan yang difailkan oleh pengarah responden tidak menunjukkan apa-apa keterangan bahawa responden adalah solven. Tidak terdapat keterangan lain yang ditunjukkan sebagai bukti kemampuan bayar responden. Oleh itu, statutori menuntut isu kekal tidak dipenuhi. Anggapan ketidakupayaan untuk membayar hutangnya jelas diperuntukkan di bawah peruntukan tersebut digunapakai terhadap responden dan tidak sesekali pun diganti (lihat perenggan 17–19).]

Notes

For cases on petition for winding up, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1709–1878.

Cases referred to

BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd [2001] 1 MLJ 356; [2001] 1 CLJ 591, HC (refd)
Citibank Bhd v Malwira Manufacturing Sdn Bhd [2012] 3 CLJ 81, HC (refd)
Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 1 LNS 360, CA (refd)
Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd [2000] 6 CLJ 290, HC (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95; [1991] 2 MTC 92; [1991] 2 BLJ 92, SC (refd)

Legislation referred to

Companies Act 1965 ss 218 (1)(e), (2)
Strata Management Act 2013 ss 78, 79

R Yogananthan (RY Nanthan & Partners) for the respondent.
Zainuddin bin Abdul Razak (Devan & Assoc) for the appellant.
T Susueelan (R Shanti, S Dhanarajaj and Thilagavaty with him) for the supporting creditor.
Company unrepresented.

Hasnah Hashim J:

[1] Enclosure 1 is the petition pursuant to s 218(1)(e) of the Companies Act 1965 dated 30 September 2015 for the following orders,

(a) that CHN Commodity Trade Centre Sdn Bhd be wound up by the court under the provisions of the Companies Act 1965;

(b) that Mr Tharma Iswaran a/l S Subramaniam be appointed as liquidator for the company;

(c) costs of this petition be taxed by the proper officer of the court and paid out of the proper assets of the company to the petitioner; and

(d) such other order may be made in the premises as shall be just.

BACKGROUND

[2] Enclosure 1 was filed on 30 September 2015. The affidavit verifying the petition was subsequently filed on 2 October 2015.

[3] It is contended by the petitioner that the respondent is indebted to the petitioner for the amount of RM1,269,347.03 being the amount due and outstanding for service charges, quit rent and insurance premiums for the properties owned by the respondent in Pandan Safari Lagoon Complex.

THE LAW

[4] Section 218(2) of the CA provides that a company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

[5] The failure on the part of the company to pay as demanded would trigger the presumption that the company is unable to pay its debt. This presumption is rebuttable and the onus will then shift onto the respondent to show that it is able to pay the debt and serve an affidavit in opposition to the petition.

[6] The court in the case of *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95; [1991] 2 MTC 92; [1991] 2 BLJ 92, its judgment had stated that a creditor, who has not been paid has the right to file a petition for winding up whatever its other motives may be.

[7] It is stated in the petition that the respondent's failure to pay the judgment sum to the petitioner triggered the presumption that the respondent is unable to pay its debts.

[8] Jeffrey Tan J (as he then was) explained what is a 'bona fide disputed debt' in the case of *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* [2001] 1 MLJ 356 at pp 361–362; [2001] 1 CLJ 591 at pp 360–361:

> For whether or not there is a bona fide dispute wholly depends upon the evidence (see *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447; [1988] 2 CLJ 424 at p 449). '... The debt must be disputed on some substantial grounds ...' (*Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95; [1991] 1 CLJ 260 at p 97 per Hashim Yeop A Sani CJ). The facts must indicate that there is a substantial dispute (*Re Nima Travel Sdn Bhd* [1986] 2 MLJ 374; [1985] 1 LNS 74 at p 376). '... It is not sufficient ... to say, 'We dispute the claim'. The (respondent) must bring forward a prima facie case which satisfies the court that there is something which ought to be tried, either before the court itself, or in an action, or by some other proceeding' (*Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246 at p 253, per Jessel MR). 'Dispute means not just differences arising out of a party's refusal to do something but controversy over contestable matters. Mere refusal to pay is not a dispute. See the cases of *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177; [1984] 1 LNS 166 and *KSM Insuran v Ong Ah Ba & Anor* [1986] 1 MLJ 237; [1984] 1 LNS 147, both decisions by George J (as he then was)' (*Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mills Sdn Bhd* [1991] 3 MLJ 309; [1991] 3 CLJ 2400 at p 314, per Hashim Yeop A Sani CJ, and cited in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat t/a Juta Benas* [1996] 1 CLJ 231 at p 236). The dispute must be bona fide in both a subjective and objective sense. Thus it must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous and which the court should therefore ignore' (*Palmer's Company Law* (23rd Ed) at p 1117; see also *Salak Park Development Sdn Bhd v Fajar Menyensinq Sdn Bhd* [1994] 4 CLJ 580; [1994] 3 AMR 2554 at p 2557). To just say 'we dispute the claim', is most definitely not enough.
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> But 'where there is a bone fide dispute as to the debt, the company cannot be said to have neglected to pay on a statutory notice' (*Palmer's Company Law* (23rd Ed) at p

1117), and a petition based on a debt which is disputed on substantial grounds will fail (see *Kumagai Gumi Co v Zenecon-Kumagai Sdn Bhd & Ors & another application* [1994] 2 MLJ 789; [1994] 1 LNS 73).

[9] In *Metal Reclamation (Industries) Sdn Bhd v JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290, Mohd Ghazali J (as he then was) said this:

> A winding up petition is not a legitimate means of seeking to enforce payment of a debt which has not been clearly determined; otherwise the courts, when faced with a winding up petition on a debt which is not based on a judgment debt, would first have to establish the debt due, whether the alleged debt claimed is the actual amount owing based on the evidence available. The courts which hear winding up petitions will then be put to unnecessary strain if a petition to wind up is based not upon a judgment debt but purely on a s 281(2)(a) notice ... (at p 298).

[10] The petitioner must satisfy the court that the respondent is indebted to the petitioner as alleged without any serious or bona fide dispute on the facts pertaining to the debt. The petitioner must substantiate its claim that there is debt due from the respondent and the respondent is unable to pay its debts.

[11] Instead of an affidavit in opposition filed by the respondent, an affidavit in reply was filed by one Gerald Yeo @ Yeo Ah Khe a director of the respondent on 24 November 2015 ('Gerald'). In his affidavit he stated that he is also a director of One Tree Capital Management Pte Ltd.

[12] According to him the respondent has an issued and paid up capital of RM10m by means of 10,000,00 shares where One Tree Capital Management Pte Ltd owns 4,900,000 and one Hooi Siew Yan owns 3,100,000 of the issued share capital of the respondent. The two contributories holding 80% of the shares in the respondent have filed a notice of intention to appear to oppose the petition.

[13] He further states in the affidavit that the respondent is not dormant. The Pandan Safari Lagoon shopping centre was developed by a developer known as Dirga Niaga (Selangor) Sdn Bhd. The developer was wound up on 1 December 2008 and a liquidator was appointed, Augustine a/l TK James.

[14] The liquidator is a director of a company called Radiant Consulting Asia Sdn Bhd ('Radiant'). The liquidator and Radiant used the services of a real estate agent to negotiate the sale of the said shopping centre sometime in November 2013.

[15] Subsequently a sale and purchase agreement was executed between the respondent to acquire 166 lots from the liquidator and from other third parties. It is further stated in the said affidavit that ss 78 and 79 of the Strata

Management Act 2013 sets out the procedure for recovery of the sums claimed by petitioner. According to Gerald the petitioner has not complied with the said procedures.

[16] The petitioner submits that the respondent is insolvent and unable to pay the debts. Justice Abdul Malik Ishak JCA in the case of *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34; [2010] 1 LNS 360 said that:

> The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorised as 'unable to pay its debts' even though the company has substantial wealth which cannot be realised immediately and even though on liquidation the company will be able to meet all its liabilities.

[17] The respondent failed to pay the judgment sum to the petitioner triggered the presumption that the respondent is unable to pay its debts. The failure on the part of the company to pay as demanded would trigger the presumption that the company is unable to pay its debt.

[18] The respondent did not file any affidavit in opposition to challenge the petition. The affidavit in reply filed by Gerald does not show any evidence that the respondent is solvent. George Varghese, JC (as he then was) in the case of *Citibank Bhd v Malwira Manufacturing Sdn Bhd* [2012] 3 CLJ 81 referred to *Sri Hartamas*'s case and in his judgment said that:

> The respondent did not produce any contemporaneous document in respect of the current operations, its management or latest available audited accounts to impress the court that it was an ongoing concern and/or that it was able to meet its liabilities as and when they became due so as to show that it was not commercially insolvent. The respondent's inability to pay its debts was drawn from all the relevant facts of this case as made available to the court.

[19] In the instant petition there is no other evidence shown as proof of the solvency of the respondent or any other contemporaneous document evidencing latest audited accounts to impress upon the court the ability of the respondent to meet its liabilities. Therefore the statutory demand issued remained unsatisfied. The presumption of inability to pay its debts expressly provided under that provision applied against the respondent and was not in any way displaced.

CONCLUSION

[20] I have considered the submissions and authorities of the parties and based on the above considerations and reasons, I find that there is sufficient evidence to show that the respondent is insolvent and unable to pay its debts.

Based on the reasons mentioned above, I am of the considered view that this is petition should be allowed as there is sufficient evidence to show that the respondent is insolvent and unable to pay its debts. Accordingly encl 1 is allowed.

Petition allowed.

Reported by Dzulqarnain Ab Fatar